

STEPHENS MEDIA, LLC d/b/a
HAWAII TRIBUNE-HERALD

CASES 37-CA-7043

**HAWAII NEWSPAPER GUILD,
LOCAL 39117,
COMMUNICATIONS WORKERS OF
AMERICA,
AFL-CIO**

37-CA-7045
37-CA-7046
37-CA-7047
37-CA-7048
37-CA-7084
37-CA-7085
37-CA-7086
37-CA-7087
37-CA-7112
37-CA-7114
37-CA-7115
37-CA-7186

**BRIEF OF *HAWAII TRIBUNE-HERALD* TO ADDRESS THE
MAY 24, 2012 ORDER OF THE BOARD CONCERNING *ANHEUSER-BUSCH***

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I. BACKGROUND

On February 14, 2011, the Board issued a Decision and Order in the above-referenced cases found at 356 NLRB No. 63. In that Decision, the Board severed the question of whether *Hawaii Tribune-Herald* had a duty to provide Hawaii Newspaper Guild, Guild Local 39117 with a “statement provided to it by employee Koryn Nako on October 19, 2005, or any other statements that it obtained in the course of its investigation of employee Hunter Bishop’s alleged misconduct.” On March 2, 2011 (via fax and U.S. Mail), the Board notified the parties of its Notice and Invitation to File Briefs¹. The Notice explained in pertinent part that:

Board precedent establishes that the duty to furnish information “does not encompass the duty to furnish witness statements themselves.” *Fleming Cos.*, 332 NLRB 1086, 1087 (2001), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of “witness statements.” This case also illustrates that the Board’s existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product.

¹ Attached as Exhibit A.

We have therefore, decided to sever this allegation from the case and to solicit briefs on the issues it raises.

Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

Thereafter, the NLRB placed on its website an announcement of the Invitation to the parties and interested amici to file briefs². However, the NLRB's website contained an announcement of the Invitation articulating an issue not present in the invitation itself:

Whether the Board should continue to adhere to the holding *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements.

On March 21, 2011, *Hawaii Tribune-Herald* communicated to the Board the confusion caused by its announcement and an articulated issue not actually found in the Notice and Invitation to File Briefs. *Hawaii Tribune-Herald* asked the Board to clarify the issues on which it seeks briefs and to reissue the Invitation. Additionally, *Hawaii Tribune-Herald* requested that the time limits be extended because of the confusion.³

On March 24, 2011, the Board, through its Executive Secretary, Lester A. Heltzer, notified *Hawaii Tribune-Herald* that the announcement on

² Attached as Exhibit B.

³ Attached as Exhibit C.

the NLRB's website "was inaccurate." The Board made clear that the operative document for the issues to be addressed remains the Notice and Invitation issued March 2, 2011, and noted that that Invitation had not been changed.⁴

Thereafter, *Hawaii Tribune-Herald*, the other parties, and various *amici* filed briefs on April 1, 2011. Only the parties were allowed to file Reply Briefs. On April 15, 2011, *Hawaii Tribune-Herald* filed a response to the brief of Counsel for the General Counsel. On May 24, 2012, the Board issued its Order, allowing *Hawaii Tribune-Herald* to address the continued viability of *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).⁵

II. ARGUMENT

A. **THE BOARD CLARIFIED THAT THE CONTINUED VIABILITY OF *ANHEUSER-BUSCH* WAS NOT AN ISSUE TO BE ADDRESSED**

The Board's May 24, 2012 Order states that the Brief of Counsel for the General Counsel, as well as certain *amici* "address an issue that was *arguably* not encompassed in the Notice and Invitation – specifically, whether the Board's decision in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978) should be overruled." There is nothing to argue about. By direction of the Board, NLRB Executive Secretary Lester A. Heltzer clarified that the

⁴ Attached as Exhibit D.

⁵ Attached as Exhibit E.

issues were limited to those set forth in the March 2, 2011 Notice and Invitation. Secretary Heltzer specifically noted that an announcement on the NLRB's website, indicating that continued viability of *Anheuser-Busch* was an issue, was **inaccurate**.

Thus, while *Hawaii Tribune-Herald* complains in its April 15, 2011 Reply Brief that the issue was addressed by Counsel for the General Counsel and others after receiving the clarification, that does not change the Order and direction of the Board. *Anheuser-Busch* continues to be extant Board law.

B. THE CONTINUED VIABILITY OF *ANHEUSER-BUSCH* WAS NOT LITIGATED IN THE INSTANT CASE

Hawaii Tribune-Herald agrees with Members Hayes and Flynn that the Notice and Invitation to File Briefs does not encompass the continued viability of *Anheuser-Busch* and said issue is a matter “beyond the scope of issues preserved for Board review by Exceptions.” By addressing the Board's May 24, 2012 Order, *Hawaii Tribune-Herald* is in no way waiving any procedural defense to an attempt now, seven years later, to litigate the continued viability of *Anheuser-Busch*.

We ask the Board to take note of the following important facts:

1. In the Complaint, the General Counsel does not argue that the holding of *Anheuser-Busch* should be overruled. (G.C. Ex. 1(zz))
2. In her opening statement, Counsel for the General Counsel does not advocate or argue that the holding of *Anheuser-Busch* has no continuing viability or that it should be overruled. In fact, Counsel for the General Counsel did not even make an opening statement. (Tr. 37).
3. At no time did Counsel for the General Counsel file a Motion to Amend the Complaint.
4. Counsel for the General Counsel, in her Brief to the ALJ in this case, does not argue to overrule *Anheuser-Busch* or argue against its continued viability.
5. ALJ McCarrick did not overrule *Anheuser-Busch* or otherwise state that it was no longer viable. He did state, erroneously, that it did not apply in this particular case because of the absence of assurances of confidentiality.
6. Neither the Union nor Counsel for the General Counsel filed any Exceptions or Cross-Exceptions addressing the continued

viability of *Anheuser-Busch*. To inject the issue at this time, in effect, is a challenge to the prosecutorial discretion of the General Counsel to not seek to overrule *Anheuser-Busch* in the Complaint or at trial. See Section 3(d) of the Act; *NLRB v. Food and Commercial Workers Local 23*, 484 U.S. 112 (1987); *King Manor Care Center*, 308 NLRB 884 (1992).

Therefore, there is not properly pending before the Board, in this case, any issue regarding the continuing viability of *Anheuser-Busch*.

III. CONCLUSION

WHEREFORE, for the reasons stated in this Brief, *Hawaii Tribune-Herald's* initial Brief filed on April 1, 2011, and its Response Brief of April 15, 2011, *Hawaii Tribune-Herald* respectfully requests that the Board find that the October 19, 2005 Statement of Koryn Nako was in fact a witness statement protected from disclosure under the existing precedent of *Anheuser-Busch, Inc.*; independently, *Hawaii Tribune-Herald* respectfully requests that the Board find that the October 19, 2005 witness statement obtained by Advertising Director Alice Sledge, taken at the direction of counsel in anticipation of litigation, was privileged from disclosure as attorney work product pursuant to *Central Tel. of Tx.*, 343 NLRB 987 (2004).

Dated: June 7, 2012
Nashville, Tennessee

Respectfully submitted,

/s/ L. Michael Zinser

L. Michael Zinser

/s/ Glenn E. Plosa

Glenn E. Plosa

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IV. CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 7th day of June, 2012, I served the foregoing RESPONSE OF *HAWAII TRIBUNE-HERALD* TO THE MAY 24, 2012 ORDER OF THE BOARD, via the Board's electronic filing system and via e-mail, upon the following:

Thomas W. Cestare, Officer-in-Charge
(thomas.cestare@nlrb.gov)
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/s/ L. Michael Zinser

L. Michael Zinser

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD

and

HAWAII NEWSPAPER GUILD
LOCAL 39117, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

Cases 37-CA-7043
37-CA-7045
37-CA-7046
37-CA-7047
37-CA-7048
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NOTICE AND INVITATION TO FILE BRIEFS

On February 14, 2011, the Board issued a Decision and Order finding, in part, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide certain information to the Union.¹ However, the Board severed the question of whether the Respondent had a duty to provide the Union with a statement provided to it by employee Koryn Nako on October 19, 2005 or any other statements that it obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct. The Board explained that

Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held

¹ 356 NLRB No. 63.

confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C. on or before April 1, 2011. The parties may file responsive briefs on or before April 15, 2011, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at <http://mynlrb.nlr.gov/efile>. If assistance is needed in filing through <http://mynlrb.nlr.gov/efile>, please contact the undersigned.

Dated, Washington, D.C., March 2, 2011.

By direction of the Board:

/s/ Lester A. Heltzer
Executive Secretary

EXHIBIT B

This is Google's cache of <https://www.nlr.gov/cases-decisions/invitations-file-briefs>. It is a snapshot of the page as it appeared on Mar 15, 2011 12:40:05 GMT. The current page could have changed in the meantime. [Learn more](#)

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Invitations to File Briefs

The National Labor Relations Board occasionally invites the public and all interested parties to file amicus briefs in cases of significance or high interest. Listed below are current and recent invitations - each with a short description of the issues involved and filing deadlines. All briefs received in response to the invitations will be posted on this page. Briefs should be filed with the Office of the Executive Secretary; contact information is provided in the text of each invitation.

» [An archive of previous invitations and briefs can be found here.](#)

Stephens Media, LLC d/b/a Hawaii Tribune-Herald

Click [here](#) to view this **invitation for briefs**. Seeks briefs on the questions: (1) whether the Board should continue to adhere to the holding in *Anheuser-Busch, Inc.*, **237 NLRB 982** (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements and, if not, what standard should be applied to requests for such statements or any other statements that an employer obtains in the course of its investigation into alleged employee misconduct; and (2) if the statement in question is not classified as a "witness statement," whether it nevertheless is privileged from disclosure to the union as attorney work product. **The parties and interested amici are invited to file briefs with the Board in Washington, D.C. on or before April 1, 2011** addressing the issues. The parties may file responsive briefs on or before April 15, 2011.

Chicago Mathematics & Science Academy Charter School, Inc.

Seeks briefs on the question of whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board. In this case, the Chicago Alliance of Charter Teachers and Staff sought a representation election for the school's teachers, social workers and counselors through the state board, while the School maintains the NLRB should conduct the election. Government entities or wholly-owned government corporations are exempt from NLRB coverage. The parties and interested amici are invited to file briefs with the Board in Washington, D.C. **on or before March 11, 2011** addressing the issue. The parties may file responsive briefs on or before March 25, 2011.

Specialty Healthcare

Seeks briefs on the question of what constitutes an appropriate bargaining unit in long-term care facilities. The United Steelworkers petitioned for an election of certified nursing assistants at a nursing home, while the employer argued the appropriate unit should include all non-professional employees, not just the CNAs. The Board agreed to take the case in order to revisit its 1991 decision in *Park Manor Care Center*, **305 NLRB 872** on what constitutes an appropriate unit in long-term care facilities. The **invitation** poses eight questions, including what the interested parties' experience has been under the Park Manor decision and whether its application has hindered or encouraged employee choice and collective bargaining. **The Board granted and extension of time to file briefs**. Accordingly, briefs shall be filed with the Board in Washington, D.C. on or before **March 8, 2011**. The parties may file responsive briefs on or before **March 22, 2011**. [Click here to view datasets related to this case requested through FOIA.](#)

Roundy's Inc.

Click [here](#) to view briefs filed in this case:

In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated in *Sandusky Mall Co.* (**329 NLRB 618, 623**), and if not, what standard should the Board adopt to define discrimination in this context? Also, what bearing, if any, does Register Guard (**351 NLRB 1110**) have on the Board's standard for finding unlawful discrimination in nonemployee access cases? An **extension of time to file** briefs was granted, and the deadline to file was January 7, 2011.

Lamons Gasket Co.

Seeks review of the Board's 2007 decision in *Dana Corp.* (**351 NLRB 434**), which found that employees and other unions should have a 45-day period in which to file for an election following an employer's voluntary recognition of a union. Briefs must be received by November 1, 2010, and all parties should be served with the brief. **The deadline to file briefs has passed.**

Note: On September 17, the employer in *Rite Aid Store #6473*, which is cited as the lead case in the Notice and **Invitation to File Briefs**, withdrew its request for review. Therefore, briefs should not be filed under RiteAid, but instead under Lamons Gasket Co. This change does not affect the scope of the review.

UGL-Unicco Service Co and Grocery Haulers, Inc.

Seeks review of the Board's 2002 decision in *MV Transportation* (**337 NLRB 770**), on the duties of a successor employer toward an incumbent union. **The deadline to file briefs has passed.**

EXHIBIT C



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March 21, 2011
(Via Electronic Filing and U.S. Mail)

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. NW, Ste. 11600
Washington D.C. 20005-3419

**RE: STEPHENS MEDIA, LLC D/B/A HAWAII TRIBUNE-HERALD; NLRB CASE
NOS. 37-CA-7043 ET AL; NOTICE AND INVITATION TO FILE BRIEFS**

Dear Secretary Heltzer:

When I received my fax copy of the Notice and Invitation to File Briefs on March 2, 2011, it communicated to me there were two issues in which the Board was interested:

1. Whether the witness statement obtained in the *Hawaii Tribune-Herald* case in fact is a witness statement under the *Fleming* and *Anheuser-Busch* cases.
2. If the statement is not classified as a witness statement, is it nevertheless attorney work product?

When one goes to the NLRB's website, your announcement of the invitation contains an issue not present in the invitation itself:

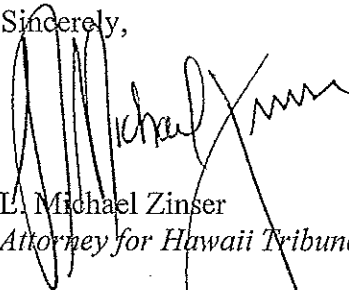
Whether the Board should continue to adhere to the holding *Anheuser-Busch, Inc.* 237 NLRB 982 (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements.

If I had not viewed the website, I would not have been aware that that was an issue. There may be other interested parties who have not seen the website announcement. There seems to be some confusion. Is the issue articulated on the website an error?

On behalf of *Hawaii Tribune-Herald*, we are asking the National Labor Relations Board to clarify the issues on which it seeks briefs and to reissue the invitation with extended time limits, in order to more fairly allow interested parties to brief the issues the Board desires to be briefed. We request that the April 1, 2011 date be extended to April 15 and that the parties' reply date be extended to April 29, 2011.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Zinser", written over the typed name and title.

L. Michael Zinser
Attorney for Hawaii Tribune-Herald

LMZ/ss

cc: Joe Frankl, Regional Director, NLRB Region 20 (Via E-mail
joseph.frankl@nlrb.gov and U.S. Mail)
Thomas W. Cestare, Officer-in-Charge, NLRB Sub-Region 37 (Via E-mail
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Meredith Burns, Esq. (Via E-mail meredith.burns@nlrb.gov and U.S. Mail)
Lowell K.Y. Chun-Hoon (Via Facsimile 808.521.8046 and U.S. Mail)

EXHIBIT D



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Executive Secretary

1099 14th Street NW, Suite 11600

Washington, DC 20570

Telephone: 202/273-1067

Fax: 202/273-4270

www.nlr.gov

March 24, 2011

Re: Stephens Media, LLC d/b/a
Hawaii Tribune-Herald
Cases 37-CA-7043, et al.

L. Michael Zinser, Esq.
The Zinser Law Firm
414 Union Street, Suite 1200
Bank of America Plaza
Nashville, TN 37219

[Via Facsimile and Regular Mail]

Dear Mr. Zinser:

This will acknowledge receipt by electronic filing and regular mail of your letter dated March 21, 2011. Your letter states that the NLRB website's announcement of the Board's March 2, 2011 Notice and Invitation to File Briefs in this case presents an issue for briefing that is not present in the Notice and Invitation itself. Accordingly, your letter requests a 14-day extension to April 15, 2011 to file briefs in response to the Notice and Invitation.

The announcement on the Agency's website to which you refer was inaccurate, and has been revised to precisely reflect the issues on which the Board seeks briefs, as set forth in the March 2, 2011 Notice and Invitation. Thus, any confusion that may have been caused by the announcement on the website has been eliminated. The Notice and Invitation, which is the operative document for the issues to be addressed, has not been changed and fully provides:

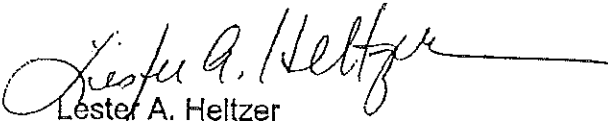
Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly

define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

Accordingly, your request for an extension of time is denied. The due date for the receipt of briefs in Washington, D.C. remains April 1, 2011.

By direction of the Board:


Lester A. Heltzer
Executive Secretary

cc: Parties

EXHIBIT E



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET NW
WASHINGTON DC 20570

Re: Stephens Media, LLC d/b/a
Hawaii Tribune-Herald
Cases 37-CA-7043, et al.

ORDER

The Board issued a Notice and Invitation to File Briefs in this case on March 2, 2011. The Respondent contends in its April 15, 2011 Response to the Acting General Counsel's brief addressing the issues presented in the Notice and Invitation that the Acting General Counsel, as well as certain amici, addressed an issue that was arguably not encompassed in the Notice and Invitation--specifically, whether the Board's decision in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), should be overruled.

In light of the Respondent's contention, we have decided to grant the Respondent leave to file a brief limited to addressing the continued viability of *Anheuser-Busch*. Accordingly, the Respondent may file a brief on this sole issue, not exceeding 15 pages in length, with the Board in Washington, D.C. on or before June 7, 2012. No responsive briefs will be accepted.¹

¹ Members Hayes and Flynn do not construe the Notice and Invitation to File Briefs as encompassing the continuing viability of *Anheuser-Busch*, which is a matter beyond the scope of issues preserved for Board review by exceptions. They would therefore disregard argument addressing this issue in briefs previously filed, and would find no need to grant the Respondent leave to file a brief addressing this issue. Further, in their view, the Respondent should not be deemed to have waived any procedural defense to litigation of this issue by filing a brief.

Dated, Washington, D.C., May 24, 2012.

By direction of the Board:

Lester A. Heltzer
Executive Secretary

cc: Parties